APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-5691

[Filed July 13, 2007]

ABDON IBARRA Plaintiff-Appellant	)
v.	)
LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT; TERESA ISAAC, Individually and in her capacity as Mayor and Chief Executive Officer for the Lexington-Fayette Urban County Government; ALAYNE WHITE, Individually and in her capacity as Commissioner of Social Services for Lexington-Fayette Urban County Government Defendants-Appellees	)

MANDATE

Pursuant to the court's disposition that was filed 2/23/07 the mandate for this case hereby issues today.

COSTS: NONE

A True Copy.

Attest:

Ms. Patricia J. Elder
Senior Case Manager

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-5691

[Filed July 5, 2007]

ABDON IBARRA Plaintiff-Appellant,	)
v.	)
LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, ET AL., Defendant-Appellees.	)

BEFORE: MERRITT, DAUGHTREY, and GRIFFIN, Circuit Judges

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of this case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/

Leonard Green, Clerk/m

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 06-5691

[Filed February 23, 2007]

ABDON IBARRA Plaintiff-Appellant,	)
v.	)
LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT; TERESA ISAAC; AND ALAYNE WHITE, Defendants-Appellees.	)

NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY.

Before: MERRITT, DAUGHTREY, and GRIFFIN, Circuit Judges.

OPINION

PER CURIAM. The plaintiff, Abdon Ibarra, appeals from two district court rulings that resulted in the dismissal of his amended complaint against the Lexington-Fayette Urban County Government (LFUCG), Mayor Teresa Isaac, and Commissioner Alayne White. In that filing, Ibarra alleged that defendant Isaac slandered him and that all three defendants unconstitutionally retaliated against him for exercising his First Amendment rights of free speech and association. In light of the United States Supreme Court's recent decision in *Garcetti v. Ceballos,* 126 S.Ct. 1951 (2006), we conclude that Ibarra has failed to establish that the speech he highlights was entitled to protection under the First and Fourteenth Amendments to the United States Constitution. It thus becomes unnecessary to review the propriety of the district court's determination that the plaintiff failed to establish a temporal link between the speech in question and his eventual termination. Moreover, we agree that the district court's rulings on the questions of the alleged infringement of the plaintiff's right of association and the allegation of defamation were correct in all respects and, therefore, affirm those rulings for the reasons given in the district court's memorandum opinion.

FACTUAL AND PROCEDURAL BACKGROUND

The facts relating to this litigation are not seriously disputed by the parties and were succinctly stated by the district court in its memorandum opinion ruling on the defendants' motion to dismiss Ibarra's amended complaint. In that decision, the district judge summarized:

> Ibarra was employed by the Lexington-Fayette Urban County Government ("LFUCG") as "Coordinator of

Immigrant Services" from December 20, 1999, to August 27, 2003. After the election of Mayor Teresa Isaac ("Mayor Isaac" or "Isaac") in November, 2002, Ibarra expressed concerns and complaints relating to the treatment of the local Hispanic community. According to the amended complaint those expressed concerns included, but are not limited to:

1. In December of 2002, Ibarra told Bruce Edwards, a member of Mayor Isaac's staff, that a non-profit organization partially funded by the LFUCG had a history of racial discrimination.

2. In January of 2003, Ibarra advised Alayne White, Commissioner of Social Services for the LFUCG, that another non-profit Hispanic organization was requiring cash "kickbacks" from Hispanic laborers who sought assistance from the organization.

3. In January of 2003, Ibarra told Mayor Isaac that two individuals who wanted to provide Hispanics with "unofficial identification cards" were proposing excessive fees for those cards and that he had been working on a project to provide government sanctioned identification cards at a much lower cost.

4. In January of 2003, Ibarra advised Council member, Paul Brooks, that Hispanic workers in the Cardinal Valley area were being charged for services represented as free and overcharged for other various services. Ibarra proposed that a Resolution be adopted by the LFUCG Council to help "quell the tide" of overcharges.

5. In January of 2003, Ibarra drafted a proposed Resolution relating to the abuses and mistreatment of the Hispanic Community.

6. In February of 2003, during the now infamous ice storm, Ibarra discussed with the *Lexington Herald-Leader* some of the "serious communication problems due to 'English only' public announcements to the local Hispanic community regarding life threatening and dangerous alternative heating sources."

Plaintiff claims that all of these communications were made to public officials and/or the newspaper for public dissemination.

Ibarra claims that, due to these expressions of concern, he was subjected to a pattern of retaliatory conduct by the LFUCG, Mayor Isaac, and Commission Wayne [sic]. For example, Ibarra claims he was removed from projects, told to stop certain investigations, told not to speak on certain subjects, and issued "severe" reprimands. He also claims that a resolution he helped prepare was pulled from the LFUCG Council's agenda. Ibarra's amended complaint states that this retaliatory conduct ultimately concluded with his termination on August 27, 2003.

Following his termination, Ibarra applied for unemployment benefits. The Kentucky Division of Unemployment Insurance conducted a hearing, the result of which was a ruling stating that Ibarra was "discharged for reasons other than misconduct" and an award of unemployment benefits.

> Also subsequent to Ibarra's termination, on August 27, 2003, Mayor Isaac conducted an audit of the Cardinal Valley Empowerment Project, a non-profit organization incorporated by Ibarra. The LFUCG also initiated a LFUCG police investigation into Ibarra's financial activities at the Cardinal Valley Center. As explained in correspondence from the LFUCG to Ibarra, attached to the Amended Complaint, the audit and investigation were to wrap up some "loose ends" regarding Ibarra's employment, and close out his relationship with the LFUCG. Ibarra cooperated with the audit. In connection with the audit, Mayor Isaac telephoned Ibarra's wife, Lori Ibarra ("Lori"), and advised her that her husband had set up several bank accounts in her name; that her husband failed to provide requested financial records; and that her husband was in serious trouble. Ibarra claims that Mayor Isaac's conduct constituted both "outrageous conduct by intentional infliction of emotional distress and slander."

Because Ibarra did not file his original complaint in this matter until August 18, 2004, the district court determined that Kentucky's applicable one-year statute of limitations barred all claims for personal injury alleged in the complaint except for the claim of retaliation relating to the plaintiff's August 27, 2003 termination. *See* KY. REV. STAT. ANN. § 413.140(1)(a). Furthermore, the court dismissed Ibarra's claim for intentional infliction of emotional distress because the alleged acts of the defendants did not constitute conduct sufficiently outrageous to justify imposition of tortious liability. Likewise, the district court dismissed the plaintiff's slander cause of action, concluding that the single telephone call from Isaac to Lori Ibarra did not place the plaintiff "into a position of public hatred, contempt, ridicule; cause him to

be shunned or avoided, or injure him in business or occupation." Finally, the district judge ruled that Ibarra's freedom of association claim must also be dismissed because the "amended complaint makes no factual allegations as to how Ibarra's freedom of association was hindered by acts of Mayor Isaac, Alayne White, or the LFUCG. Moreover, Plaintiff's amended complaint fails to state with whom he was prevented from associating."

Subsequently, the district court also granted summary judgment in favor of the defendants on the remaining retaliation cause of action. In doing so, the district judge concluded that "[t]he Court need not determine whether Ibarra's speech constituted constitutionally protected speech because he cannot show that his speech was a motivating factor in the defendants' decision to terminate his employment." The court also noted:

> Ibarra has not demonstrated that his protected conduct in January, February, and March of 2003 led to his termination several months later in August of 2003. Furthermore, Ibarra has not presented any evidence that he engaged in any protected conduct after March of 2003 that served as a motivating factor in his dismissal.

Before this court, Ibarra now concedes the propriety of the district court's dismissal of the intentional infliction of emotional distress claim. He continues to assert, however, the viability of the other causes of action asserted in his amended complaint.

DISCUSSION

As recognized by this court sitting en banc:

> A retaliation claim essentially entails three elements: (1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two -- that is, the adverse action was motivated at least in part by the plaintiffs protected conduct.

Thaddeus-X v. Blatter, 175 F.3d 378, 394 (6th Cir. 1999). In this case, the parties do not dispute that Ibarra was subjected to an adverse action (termination) that would deter a reasonable individual from engaging in the conduct that prompted the employment decision. The district court, assuming for the sake of argument that Ibarra's speech was constitutionally protected, nevertheless concluded that the relatively innocuous comments made by the plaintiff in January-March 2003 could not be taken as motivation for the termination of Ibarra's employment a full five months later. After the district court's ruling, however, the United States Supreme Court released its opinion in *Garcetti v. Ceballos,* 126 S.Ct. 1951 (2006), which held explicitly "that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 1960. That opinion, obviously, has direct implications for this case.

By now, the legal principle that "the First Amendment protects a public employee's right, in certain circumstances,

to speak as a citizen addressing matters of public concern" is beyond legitimate dispute. *See id.* at 1957. This protection exists, moreover, even in some instances in which the expressions are made at the workplace during work hours. *See id.* at 1959. Nevertheless, when an individual acts not as a citizen, but rather merely performs "the tasks he was paid to perform, [he] act[s] as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance." *Id.* at 1960.

Ibarra's complaint alleges that his position as "Coordinator of Immigrant Services" required him to undertake the following duties and responsibilities:

> to act as liason [sic] for the LFUCG with the Hispanic community and to promote institutional changes and updates; to improve service delivery to the Hispanic community; to implement educational programs; to achieve cultural competence within the comprehensive service being provided to the community such as health, education, mental health, police services, and all other fields relevant to the improvement and support of the Hispanic community as a whole; to ensure that the Hispanic community made a smooth transition into the educational, social and economic infrastructure of the community as a whole; and to ensure that they affirmatively availed themselves of the rights and protections of the legal and justice system operating within the Commonwealth of Kentucky.

Hence, the plaintiff was, by his own admission, charged with the responsibility of advocating for the Hispanic community with the various governmental agencies and social

service providers in the Lexington-Fayette County area. Indeed, as Ibarra himself conceded in his amended complaint, the comments he made that he now alleges were the catalyst for the adverse employment decision concerned "problems, dangers, abuses and/or mistreatment of the Hispanic community" and "were made, in large part, in response to inquiries by public officials, including, but not exclusively, Mayor Teresa Isaac, members of the Mayoral staff, various LFUCG Council members, and the newspaper, the Lexington Herald Leader." Consequently, the comments made by the plaintiff constituted no more than a part of the performance of the tasks that he was hired and paid to complete. The restriction by the defendants of such "speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Garcetti,* 126 S.Ct. at 1960.

The speech that the plaintiff emphasizes to support his allegation of a constitutional violation was, therefore, not constitutionally-protected speech, given the context in which the comments were made. Because Ibarra thus failed to establish the first element of his retaliation claim, we need not engage in an analysis of whether that speech was a motivating factor in the decision to terminate the plaintiff's employment. The district court's rejection of the retaliation claim was thus proper, as were the rulings on the other claims brought by the plaintiff.

CONCLUSION

For the reasons set out above, we AFFIRM the judgment of the district court granting summary judgment to the defendants and dismissing the complaint in this case.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil Action No. 5:04-395-JMH

[Filed May 4, 2006]

ABDON IBARRA,	)
Plaintiff,	)
	)
v.	)
	)
LEXINGTON-FAYETTE URBAN	)
COUNTY GOVERNMENT, et al.,	)
Defendants.	)
	)

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the Lexington-Fayette Urban County Government ("LFUCG"), Mayor Teresa Isaac, and Commissioner Alayne White's (collectively referred to as "Defendants") motion for partial summary judgment on damages [Record No. 22] and motion for summary judgment on liability [Record No. 26]. Plaintiff Abdon Ibarra has responded [Record Nos. 30 & 32], to which Defendants have replied [Record Nos. 35 & 34]. Defendants have also filed a motion for partial summary judgment on Ibarra's claims against Mayor Isaac and Commissioner White in their official

capacities [Record No. 25], to which Plaintiff did not file a response, and the response time has passed. Fully briefed, and the Court being duly advised, this matter is ripe for decision.

BACKGROUND

Ibarra was employed by the LFUCG, as "Coordinator of Immigrant Services" from December 20, 1999, to August 27, 2003. Ibarra's duties in this position included acting as a liaison between the LFUCG and the Hispanic community to ensure that people in that community were receiving adequate services. After the election of Mayor Isaac in November 2002, Ibarra expressed concerns about the local Hispanic community. Ibarra claims that all of these communications were made to public officials and/or to newspapers for public dissemination. Because he expressed these concerns, Ibarra contends, he was subjected to a pattern of retaliatory conduct by the LFUCG, Mayor Isaac, and Commissioner White, Commissioner of Social Services for the LFUCG, which culminated in his termination on August 27, 2003. Ibarra claims he was removed from projects, told to stop certain investigations, told not to speak at a meeting, reprimanded for speaking to the press without prior approval, and issued additional "severe" reprimands.

Ibarra brought suit against the LFUCG, Mayor Isaac, and Commissioner White under 42 U.S.C. § 1983 for retaliating against him for exercising his First Amendment rights and under Kentucky law for intentional infliction of emotional distress and slander. In its November 9, 2004, Memorandum Opinion and Order granting in part and denying in part Defendants' motion to dismiss, the Court held that "[t]he only act alleged in Count I of Ibarra's amended complaint that may be the subject of a timely claim of retaliation under § 1983 is

the termination of Ibarra's employment on August 27, 2003." Because the Court dismissed Ibarra's claims of slander and intentional infliction of emotional distress, Ibarra's § 1983 claim for retaliation based upon his termination was the only claim to withstand Defendants' motion to dismiss.

STANDARD OF REVIEW

Defendants have moved the Court pursuant to Federal Rule of Civil Procedure 56(c) to grant summary judgment in their favor. "Summary judgment is appropriate when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law." *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 797 (6th Cir. 2005)(citing Fed. R. Civ. P. 56(c)). The moving party bears the initial burden to show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). This burden is met by showing the court that there is an absence of evidence on a material fact on which the nonmoving party has the ultimate burden of proof at trial. *Id.* at 325. A fact is material if its resolution will affect the outcome of the lawsuit. *Waters v. City of Morristown*, 242 F.3d 353, 358 (6th Cir. 2001); *see Pharakhone v. Nissan N. Am., Inc.*, 324 F.3d 405, 407 (6th Cir. 2003) ("If, under the governing law, the outcome would be the same regardless of how a factual dispute is resolved, the dispute is no bar to summary judgment."). Once the moving party satisfies its burden, the burden then shifts to the nonmoving party to "come forward with some probative evidence to support its claim." *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994). Entry of summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

When determining the merits of a summary judgment motion, "the evidence, all facts, and any inferences that may be drawn from the facts must be viewed in the light most favorable to the nonmoving party. " *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 622 (6th Cir. 2000); *see Multimedia 2000, Inc. v. Attard*, 374 F.3d 377, 380 (6th Cir. 2004). The Court must not weigh the evidence, but must decide whether there are genuine issues for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Id.* at 252. Although the disputed issue need not be "resolved conclusively in favor of the nonmoving party," Plaintiff, as the nonmoving party in this case, "must present significant probative evidence that makes it necessary to resolve the parties' differing versions of the dispute at trial." *60 Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987)(citation omitted).

ANALYSIS

I. Defendants' Motion for Partial Summary Judgment on Plaintiff's Claims Against Mayor Isaac and Commissioner White in Their Official Capacities

In his complaint, Ibarra brought claims against Mayor Isaac and Commissioner White in their individual and official capacities. "A suit against an individual in his official capacity is the equivalent of a suit against the governmental entity." *Matthews v. Jones*, 35 F.3d 1046, 1049 n.14 (6th Cir. 1994). "There is no longer a need to bring official-capacity actions against local government officials, . . . local government units can be sued directly for damages and injunctive or declaratory relief." *Kentucky v. Graham*, 473 U.S. 159, 167 (1985)(citing

Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978)). The court in *Leach v. Shelby County Sheriff*, 891 F.2d 1241 (6th Cir. 1989) instructed, "a suit under section 1983 normally should be brought against either or both of two defendants: the local public official in his individual capacity and the local government which employs or is sought to be held responsible for the acts of that local public official." *Id.* at 1244-45. As Ibarra has named the LFUCG in his suit, his claims against Mayor Isaac and Commissioner White in their official capacities are redundant and will be dismissed.

II. Defendants' Motion for Summary Judgment on Plaintiff's Remaining Claim Under § 1983

A government employee has the right to speak out on matters of public concern without fear of reprisal from his or her employer. *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1185 (6th Cir. 1995). To prevail on his First Amendment retaliation claim, Ibarra, as a public employee, must establish:

> "(1) that [he] was engaged in a constitutionally protected activity; (2) that the defendant's adverse action caused [him] to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the adverse action was motivated at least in part as a response to the exercise of [his] constitutional rights."

Leary v. Daeschner, 228 F.3d 729, 737 (6th Cir. 2000) (quoting *Bloch v. Ribar*, 156 F.3d 673, 678 (6th Cir. 1998)). When there is evidence that the adverse employment action was the result of both speech and non-speech motives, the public employee must show that his or her speech was a motivating factor in the employer's decision. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285-87

(1977). If the plaintiff establishes the above three elements, the burden of persuasion shifts to the defendants, who must show by a preponderance of the evidence "'that [they] would have taken the same action even in the absence of the protected conduct.'" *Leary*, 228 F.3d at 737 (quoting *Jackson v. Leighton*, 168 F.3d 903, 909 (6th Cir. 1999)).

The Court need not determine whether Ibarra's speech constituted constitutionally protected speech because he cannot show that his speech was a motivating factor in the defendants' decision to terminate his employment. In this case, Ibarra "must link the speech in question to the [defendants'] decision to dismiss [him]." *Bailey v. Floyd County Bd. of Educ.*, 106 F.3d 135, 145 (6th Cir. 1997). Ibarra must present "sufficient evidence to allow a reasonable factfinder to conclude, by a preponderance of the evidence, that [his] speech, at least in part, motivated the defendants to discharge [him]." *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1055 (6th Cir. 2001). It is undisputed that termination is an adverse action that serves to chill an ordinary person such as Ibarra from continuing to speak out about issues facing the Hispanic community. *See id.* Key to the Court's analysis is determining whether Ibarra has shown that Defendants' decision to terminate him was motivated by his protected speech. As outlined below, however, Ibarra has failed to create a genuine issue of material fact that his speech was a motivating factor in his termination.

Ibarra claims that he was terminated because he expressed concern about several issues regarding Lexington's Hispanic community. He contends that the following examples support his argument that he was terminated in retaliation for exercising his First Amendment right to free speech:

1. Before Mayor Isaac began her term and while Ibarra was serving under former Mayor Pam Miller, Hispanic publication *El Mundo* interviewed Ibarra. At a meeting on March 13, 2003, Ibarra was reprimanded by Commissioner White for interviewing with the publication without receiving prior approval for the interview.

2. In December of 2002, Ibarra told Bruce Edwards, Mayor Isaac's press secretary, that the Hispanic Initiative Network ("H.I.N"), a non-profit organization partially funded by the LFUCG, had a history of racial discrimination. In January of 2003, Ibarra advised Commissioner White that Ben Figueras, president of another non-profit Hispanic organization, was requiring cash "kickbacks" from Hispanic laborers who sought assistance from the organization. Commissioner White subsequently admonished Ibarra not to tell anyone else and to stop his investigation until she contacted him.

3. In January of 2003, Ibarra told Mayor Isaac that two individuals who wanted to provide Hispanics with "unofficial identification cards" were proposing excessive fees for those cards and that he had been working on a project to provide Mexican government sanctioned identification cards at a much lower cost. Ibarra was later removed from the project. The project was assigned to Commissioner White, whom Ibarra complains did nothing to advance the project.

4. In January of 2003, Ibarra advised Council Member Paul Brooks that Hispanic workers in the Cardinal Valley area were being charged for services represented as free and overcharged for various other

services. Ibarra proposed that a resolution be adopted by the LFUCG Council to help stop the overcharging. In January of 2003, Ibarra drafted a proposed resolution relating to the abuses and mistreatment of Lexington's Hispanic community. The proposed resolution was later pulled from the agenda for the LFUCG Council meeting and was never discussed again. At a March 13, 2003, meeting, Ibarra was reprimanded for discussing and drafting the resolution without first consulting or receiving approval from Commissioner White.

5. In February of 2003, Ibarra discussed with the *Lexington Herald-Leader* some of the "serious communication problems due to 'English only' public announcements to the local Hispanic community regarding life threatening and dangerous alternative heating sources" used during an ice storm. (Amended Compl. ¶ 18f.) Commissioner White subsequently reprimanded Ibarra for speaking to the newspaper without prior approval from Commissioner White or Mayor Isaac. At the March 13, 2003, meeting, Ibarra was again reprimanded for speaking to the newspaper without prior approval.

6. Ibarra's duties and responsibilities included actively participating at task force meetings sponsored by the LFUCG. In March 2003, Commissioner White directed Ibarra not to speak out at a task force meeting.

Ultimately, however, Plaintiff fails in his efforts to identify a causal link between his protected conduct and his termination. When asked in his deposition if he believed that his comments about Ben Figueras led to his termination,

Ibarra replied that his speaking out about Figueras could have been a factor. Ibarra testified that Figueras later met with Commissioner White at her office. He suspects, but admitted in his deposition that he has no proof, that they spoke about terminating him. When pressed for evidence that his comments about Figueras led to his termination, Ibarra admitted that he did not have any proof, but that he "deduced that from what I've gone through." (Ibarra Dep. Vol. 1, June 30, 2005, 152:6-7.) As the Sixth Circuit held in *Harbin-Bey v. Rutter,* 420 F. 3d 571 (6th Cir. 2005), "conclusory allegations of retaliatory motive 'unsupported by material facts will not be sufficient to state . . . a claim under § 1983.'" *Id.* at 580 (quoting *Gutierrez v. Lynch,* 826 F.2d 1534, 1538 (6th Cir. 1987)).

Ibarra admitted in his deposition that Mayor Isaac had discretion to assign the identification card project to Commissioner White. He also stated that he did not have any evidence that Mayor Isaac gave the project to Commissioner White because she was upset by Ibarra's speaking out on the issue. Moreover, Ibarra has not presented any evidence that he was terminated because he expressed interest in pursuing the identification card project.

Before he started on the resolution for Council Member Brooks, Ibarra did not inform Commissioner White of his plans to began work on the project. Ibarra concedes in his deposition that it was reasonable for Commissioner White to require him to talk to her before working on a resolution with a council member (Ibarra Dep. Vol. 1, 153:6.) Ibarra complains specifically about how Commissioner White did not inform him of that requirement in a "constructive non-reactionary way." (*Id.* 153:7-8) When asked whether he felt it was unreasonable for Commissioner White, his supervisor, to know what he was working on, Ibarra agreed that keeping

Commissioner White informed was not an unreasonable request. Ibarra noted that Commissioner White told him that they, presumably Social Services, worked for the Mayor, not the Council. Ibarra emphasized, however, that he objected to her "demeanor" and analogized it to a drill sergeant telling him to "drop and do ten." (*Id.* 157:19.) Ibarra does not submit any evidence that Commissioner White or Mayor Isaac were adverse to the content of the resolution or that he was terminated because he spoke out about the need for a resolution to protect Lexington's Hispanic community from being defrauded or overcharged by service providers. Based on Plaintiff's testimony, Commissioner White's criticism was limited to her dissatisfaction with Ibarra for working on the resolution without speaking with her first.

Ibarra attempts to raise a genuine issue of material fact by claiming that Defendants forbade him from speaking to the press. The memo submitted by Ibarra detailing the discussion during the March 13, 2003, meeting at which Ibarra was reprimanded for speaking to the press states that Ibarra was non-compliant with the expectations of his superiors by "[i]nterviewing with *El Mundo,* without obtaining prior approval for the interview" and for "[i]nterviewing with the *Lexington Herald-Leader* without prior approval." In his deposition, Ibarra explains that after March 13, 2003, he remembered Commissioner White telling him, "I need to know everything before you speak to the press. And don't speak to the press. I need to know everything before. . . . Explain what you want to talk to the press about, but don't talk to the press without me knowing everything." (Ibarra Dep. Vol. 1, 178:18-25.) Ibarra claims that he understood her to mean that he could not speak to the press. Ibarra's own emails, however, belie this conclusion about Commissioner White's instructions. Ibarra submitted emails he wrote to Commissioner White on April 24, 2003, and July 2, 2003,

that show that he continued to speak to newspaper reporters after clearing the interviews with Mayor Isaac's press secretary, Bruce Edwards. Furthermore, Ibarra has not presented evidence that Defendant's decision to terminate his employment was motivated by his speaking to the press.

Ibarra conceded that the meeting at which he was told by Commissioner White to be quiet was a meeting at which Commissioner White told all LFUCG employees, except the meeting's moderator, to be quiet so that the audience members would be able to voice their concerns. Most troubling to Ibarra was the way in which Commissioner White silenced him: "I mean, it's not how — what things are said but how they're said that conveys a lot. And to me it conveyed: You shut up." (Ibarra Dep. Vol. 1, 142:25-143:2.) Plaintiff's dissatisfaction with the "way" in which Commissioner White ordered him to be quiet during a meeting does not give rise to liability under § 1983. Again, Ibarra has not presented evidence that supports his theory that his protected conduct was a motivating factor in the defendants' decision to terminate him.[1]

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[1] Regarding the other examples presented by Ibarra, even if the Court assumes *arguendo* that Commissioner White's instructions to Ibarra (1) to not get involved in a police investigation of an immigrant smuggling scheme, (2) to not attend monthly budget meetings, (3) to relocate to a downtown office from his office at the Cardinal Valley Center, and her criticism of Ibarra for (4) not reporting to the downtown offices during the February 2003 ice storm and (5) for approving the establishment of a health clinic when a city contract was not in place are examples of Ibarra being reprimanded for engaging in conduct protected by the First Amendment, Ibarra has not shown that the decision to terminate him was based on that conduct. Furthermore, the Court reminds Ibarra of its holding in its November 9, 2004 Memorandum

Ibarra has not presented evidence to establish that he was terminated because he spoke out about issues that affect Lexington's Hispanic community. He has not pointed to "'specific, nonconclusory allegations' reasonably linking [his] speech to [his termination]." *Bailey*, 106 F.3d at 144 (citing *Wright v. Illinois Dep't of Children & Family Servs.*, 40 F.3d 1492, 1500 (7th Cir. 1994)). Plaintiff has not presented any evidence that Defendants objected to the things that Ibarra was saying — local residents are being scammed, burning charcoal indoors is a dangerous alternative heating source, allowing certain individuals to produce identification cards will be unduly expensive for Lexington's Hispanic residents — instead, Defendants have presented evidence that they objected to the way in which Plaintiff was proceeding with his work without notifying his supervisor of his activities beforehand.[2]

At the March 13, 2003 meeting, Ibarra was reprimanded for non-compliance in the following areas: approaching

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Opinion and Order: "Even if the Court were to construe these actions as § 1983 violations, the claims are barred as all actions occurred more than one year before this action was filed on August 18, 2004."

[2] Ibarra has stated that Commissioner White, when referring to Ibarra's participation in a couple of newspaper articles, said that he had "pissed some people off." (Ibarra Dep. Vol. 2, July 30, 2005, 54:13.) Even if Ibarra could show that Defendants disagreed with his statements, that showing, without more, would still be insufficient. *See Bailey*, 106 F.3d at 145 ("The nonmoving party may not rely on the mere fact that an adverse employment action followed speech that the employer would have liked to prevent. Rather, the employee must link the speech in question to the defendant's decision to dismiss her." (citations omitted)).

Council Member Paul Brooks about the resolution without seeking prior approval from Commissioner White, interviewing with *El Mundo* and the *Lexington Herald-Leader* without seeking prior approval, not calling Commissioner White during the ice storm, and approving the establishment of a health clinic when there was no legal contract in place authorizing its establishment. Plaintiff has conceded that, in the March 13, 2003, memo and meeting, he was informed of how he was not complying with certain expectations of Mayor Isaac and her staff. Plaintiff argues that the March 13, 2003, meeting and memo "criticized and reprimanded [him] for his speech activities," and because the meeting and memo were mentioned in Commissioner White's August 26, 2003, memo recommending Ibarra's termination, the August memo "inextricably link[s] Ibarra's prior speech to his subsequent termination." The Court is not persuaded by Ibarra's attempts to connect the two memos to create a genuine issue. The August 2003 memo contains only one reference to the March 2003 meeting and memo: "Over the past eight months, I have periodically met with Mr. Ibarra. On March 13, 2003, Milton Dohoney, Gerald Smith and I met with Mr. Ibarra to discuss several job performance factors (see attached). Mr. Ibarra does not comply with the job requirements and he does not comply with supervision." The March memo criticizes Plaintiff's actions in speaking to the press and working on a resolution *without prior approval*. Whether Plaintiff felt "castigated" by the remarks made at the March 2003 meeting is immaterial. Moreover, in the August 26, 2003 memo, Commissioner White does not mention any disagreement or dissatisfaction with Ibarra for expressing his views about Lexington's Hispanic community to the public or to her.[3]

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[3] Instead, in the memo, she bases her decision to recommend Ibarra's termination on the following: Ibarra would not consistently

Ibarra has not met his burden of presenting probative evidence that he was terminated because he exercised his First Amendment rights. Without any evidence that Defendants terminated him because he spoke out about certain issues, Ibarra cannot survive summary judgment on his § 1983 claim.[4]

Furthermore, the evidence that Plaintiff has submitted does not remedy the temporal disconnect between Ibarra's statements and his termination. Several courts have

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provide her with a schedule of his work activities, he had not responded to her request for suggestions and/or goals for improving his work performance, he had not complied with her requests to schedule a visit to the Cardinal Valley Center, he did not attend two August 2003 meetings and did not provide an excuse for his absences, and in general, he had not complied with supervision.

[4] Ibarra claims that his case is almost identical to that of the plaintiff in *Cockrel v. Shelby County School District,* but unlike Cockrel, Ibarra has not presented "several pieces of evidence [that] work in [his] favor." *Cockrel,* 270 F.3d at 1056. In *Cockrel,* the Sixth Circuit noted the following favorable evidence: the defendants initiated an early evaluation of Cockrel, Cockrel was the only tenured teacher to receive more than one evaluation within three years, the defendants instituted an open-ended evaluation after Cockrel engaged in the protected conduct in dispute, the evaluation was a factor in terminating Cockrel, attached to the evaluation were several letters from parents and staff critical of Cockrel's decision to engage in the protected conduct. *Id.* Commissioner White met with Ibarra for his yearly evaluation on June 30, 2003 and July 1, 2003. In contrast to Cockrel's situation, Ibarra neither claims that his evaluation was initiated in response to him engaging in protected conduct nor does he provide evidence that Defendants evaluated him more frequently than his co-workers or surprised him with early or unscheduled evaluations.

considered the length of time between the protected conduct and the adverse employment action as a factor in determining whether a plaintiff has linked his conduct to his former employer's adverse action. *See Timm v. Wright State Univ.*, 375 F.3d 418, 423 (6th Cir. 2004); *Hafford v. Seidner*, 183 F.3d 506, 515 (6th Cir. 1999); *Cooper v. City of North Olmsted*, 795 F.2d 1265, 1272 (6th Cir. 1986); *Dixon v. Gonzalez*, 382 F. Supp. 2d 911, 918 (E.D. Mich. 2005). In this case, Ibarra has not demonstrated that his protected conduct in January, February, and March of 2003 led to his termination several months later in August of 2003. Furthermore, Ibarra has not presented any evidence that he engaged in any protected conduct after March of 2003 that served as a motivating factor in his dismissal.[5]

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[5] Based on Ibarra's submitted correspondence, in the five to six months that elapsed between Ibarra's protected conduct in the first three months of 2003 and his termination in August 2003, Ibarra continued to (1) inform Defendants of ways to assist Lexington's Hispanic community, *see* E-mail from Abdon Ibarra, to Alayne White (Mar. 6, 2003, 08:24) (regarding emergency response plan); E-mail from Abdon Ibarra, to Teresa Isaac (Apr. 3, 2003, 12:19) (discussing disturbances in Valley Park), (2) work at the Cardinal Valley Community Center, *see* E-mail from Abdon Ibarra, to Loretta Cory (Aug. 20, 2003, 08:19) (notifying Cory that he would be working at the Center that day), (3) speak to the press, *see* E-mail from Abdon Ibarra, to Alayne White (Apr. 24, 2003, 20:42) (discussing Ibarra's comments to a reporter on a new school superintendent); E-mail from Abdon Ibarra, to Alayne White (July 2, 2003, 07:42) (informing Commissioner White that he had spoken to reporters), and (4) attend training sessions, *see* E-mail from Abdon Ibarra, to Loretta Cory (July 16, 2003, 07:22) (regarding leadership training). Again, Ibarra does not present evidence that his protected conduct, whether it occurred before or after March of 2003, motivated Defendants to discharge him.

CONCLUSION

Ibarra's job duties as Immigrant Services Coordinator included assisting the LFUCG in understanding the needs of Lexington's Hispanic community. Although Ibarra argues that he was terminated because he spoke out about these issues, he has failed to produce evidence linking that speech to his termination. Without that evidence, he cannot set forth a prima facie case for retaliation in violation of the First Amendment. As the Court will grant summary judgment in favor of Defendants, Defendants' motion for partial summary judgment on damages is denied as moot.

Accordingly, and for the reasons stated above, **IT IS ORDERED:**

(1) that Defendants' motion for summary judgment on Plaintiff's claims against Mayor Isaac and Commissioner White in their official capacities [Record No. 25] be, and the same hereby is, **GRANTED;**

(2) that Defendants' motion for summary judgment [Record No. 2 6] be, and the same hereby is, **GRANTED;** and

(3) that Defendants' motion for partial summary judgment on damages [Record No. 22] be, and the same hereby is, **DENIED AS MOOT.**

This the 4th day of May, 2006.

Signed By:

Joseph M. Hood /s/JMH
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil Action No. 5:04-395-JMH

[Filed May 4, 2006]

ABDON IBARRA,	)
Plaintiff,	)
	)
v.	)
	)
LEXINGTON-FAYETTE URBAN	)
COUNTY GOVERNMENT, *et al.*,	)
Defendants.	)
	)

JUDGMENT

In accordance with the Order of even date and entered contemporaneously herewith,

IT IS HEREBY ORDERED:

(1) That this action be, and the same hereby is, **DISMISSED AND STRICKEN FROM THE ACTIVE DOCKET.**

(2) That all pending motions be, and the same hereby are, **DENIED AS MOOT.**

(3) That all scheduled proceedings be, and the same hereby are, **CONTINUED GENERALLY.**

(4) That this Order is **FINAL AND APPEALABLE** and **THERE IS NO JUST CAUSE FOR DELAY.**

This the 4th day of May, 2006.

Signed By:

Joseph M. Hood /s/JMH
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil Action No. 5:04-395-JMH

[Dated November 9, 2004]

ABDON IBARRA,)
Plaintiff,)
)
v.)
)
LEXINGTON-FAYETTE URBAN)
COUNTY GOVERNMENT, *et al.*,)
Defendants.)
)

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Defendants' motion to dismiss [Record No. 9]. Plaintiff has responded [Record No. 10], to which Defendants have replied [Record No. 11]. The matter having been fully briefed, and the Court being duly advised, this matter is ripe for decision.

STATEMENT OF THE CASE

For purposes of a Fed. R. Civ. P. 12(b)(6) motion to dismiss, opposing counsel and the Court must accept

Plaintiff's allegations as true. Consequently, the following factual background is based on Plaintiff Abdon Ibarra's ("Ibarra") complaint, as amended.

Ibarra was employed by the Lexington-Fayette Urban County Government ("LFUCG") as "Coordinator of Immigrant Services" from December 20, 1999, to August 27, 2003. [Amended Complaint ¶14]. After the election of Mayor Theresa Isaac ("Mayor Isaac" or "Isaac") in November, 2002, Ibarra expressed concerns and complaints relating to the treatment of the local Hispanic community. [Amended Complaint ¶¶ 16, 17, 18]. According to the amended complaint those expressed concerns included, but are not limited to:

1. In December of 2002, Ibarra told Bruce Edwards, a member of Mayor Isaac's staff, that a non-profit organization partially funded by the LFUCG had a history of racial discrimination. [Amended Complaint ¶18a].

2. In January of 2003, Ibarra advised Alayne White, Commissioner of Social Services for the LFUCG, that another non-profit Hispanic organization was requiring cash "kickbacks" from Hispanic laborers who sought assistance from the organization. [Amended Complaint ¶18b].

3. In January of 2003, Ibarra told Mayor Isaac that two individuals who wanted to provide Hispanics with "unofficial identification cards" were proposing excessive fees for those cards and that he had been working on a project to provide government sanctioned identification cards at a much lower cost. [Amended Complaint ¶18c].

4. In January of 2003, Ibarra advised Council member, Paul Brooks, that Hispanic workers in the Cardinal Valley area were being charged for services represented as free and overcharged for other various services. Ibarra proposed that a Resolution be adopted by the LFUCG Council to help "quell the tide" of overcharges. [Amended Complaint ¶18d].

5. In January of 2003, Ibarra drafted a proposed Resolution relating to the abuses and mistreatment of the Hispanic Community. [Amended Complaint ¶18e].

6. In February of 2003, during the now infamous ice storm, Ibarra discussed with the *Lexington Herald-Leader* some of the "serious communication problems due to 'English only' public announcements to the local Hispanic community regarding life threatening and dangerous alternative heating sources." [Amended Complaint ¶18f].

Plaintiff claims that all of these communications were made to public officials and/or the newspaper for public dissemination.

Ibarra claims that, due to these expressions of concern, he was subjected to a pattern of retaliatory conduct by the LFUCG, Mayor Isaac, and Commissioner Wayne. [Amended Complaint ¶21]. For example, Ibarra claims he was removed from projects, told to stop certain investigations, told not to speak on certain subjects, and issued "severe" reprimands. [Amended Complaint ¶22]. He also claims that a resolution he helped prepare was pulled from the LFUCG Council's

agenda. [Amended Complaint ¶22]. Ibarra's amended complaint states that this retaliatory conduct ultimately concluded with his termination on August 27, 2003. [Amended Complaint ¶23].

Following his termination, Ibarra applied for unemployment benefits. [Amended Complaint ¶27]. The Kentucky Division of Unemployment Insurance conducted a hearing, the result of which was a ruling stating that Ibarra was "discharged for reasons other than misconduct" and an award of unemployment benefits. [Amended Complaint ¶28].

Also subsequent to Ibarra's termination, on August 27, 2003, Mayor Isaac conducted an audit of the Cardinal Valley Empowerment Project, a non-profit organization incorporated by Ibarra. [Amended Complaint ¶38]. The LFUCG also initiated a LFUCG police investigation into Ibarra's financial activities at the Cardinal Valley Center. [Amended Complaint ¶39]. As explained in correspondence from the LFUCG to Ibarra, attached to the Amended Complaint, the audit and investigation were to wrap up some "loose ends" regarding Ibarra's employment, and close out his relationship with the LFUCG. Ibarra cooperated with the audit. [Amended Complaint ¶38]. In connection with the audit, Mayor Isaac telephoned Ibarra's wife, Lori Ibarra ("Lori"), and advised her that her husband had set up several bank accounts in her name; that her husband failed to provide requested financial records; and that her husband was in serious trouble. [Amended Complaint ¶40]. Ibarra claims that Mayor Isaac's conduct constituted both "outrageous conduct by intentional infliction of emotional distress and slander." [Amended Complaint ¶43].

STANDARD OF REVIEW

Defendants have moved the Court pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss Plaintiff's claims against them. A district court may dismiss a suit pursuant to Fed. R. Cir. P. 12(b)(6) if the plaintiffs fail to state a claim for which relief may be granted. *See Decker v. Merrill-Lynch, Pierce, Fenner and Smith, Inc.*, 205 F.3d 906, 909 (6th Cir. 1995). A complaint should only be dismissed when "it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995). While "[a]ll factual allegations are deemed true and any ambiguities must be resolved in plaintiff's favor" *Persian Galleries Inc. v.* Transcontinental *Ins. Co.*, 38 F.3d 253, 258 (6th Cir. 1994), the Court "need not accept as true legal conclusions or unwarranted factual inferences." *Gahafer v. Ford Motor Co.*, 328 F.3d 859, 891 (6th Cir. 2003) *(quoting Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987)). While a complaint need only give "fair notice of what the plaintiff's claim is and the grounds upon which it rests" *Lawler v. Marshall*, 898 F.2d 1196, 1199 (6th Cir. 1990) *(quoting Conley v. Gibson*, 355 U.S. 41, 47 (1957)), the plaintiff must assert more than bare legal conclusions. *In re DeLorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir. 1993) *(citing Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988)). "In practice, 'a ... complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under *some* viable legal theory.'" *Scheid*, 859 F.2d at 436 *(quoting Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985) *(quoting In re Plywood Antitrust Litigation*, 655 F.2d 627, 641 (5th Cir. 1981)).

DISCUSSION

Defendants argue that the actions stated in Count I of Ibarra's amended complaint, with the exception of termination of employment, are time barred in that the conduct complained of occurred more than one year prior to the filing of this action. Defendants further argue that Ibarra's § 1983 claim, as stated in Count One of his amended complaint, must fail as the record in this action, and matters of which this Court may take judicial notice, demonstrate that Ibarra's employment was not terminated in response to the exercise of his constitutional rights. Defendants state that Count II - claims for intentional infliction of emotional distress and slander - must be dismissed because the conduct alleged in the amended complaint is not sufficiently outrageous to support such a claim and the statements made were not defamatory. Finally, Defendants claim that Count III of the amended complaint does not allege any acts in violation of Ibarra's civil rights apart from those acts alleged in the proceeding portions of the amended complaint. The Court will examine each of these arguments below.

I. Section 1983 Claims

The only act alleged in Count I of Ibarra's amended complaint that may be the subject of a timely claim of retaliation under § 1983 is the termination of Ibarra's employment on August 27, 2003. Ibarra's other allegations of retaliation - removal from a project, admonishments, a proposed resolution being pulled from an agenda, reprimands, directions not to attend certain meetings, a change of office location, and a derogatory comment - do not rise to the level of "an action caus[ing] the plaintiff to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity." *Bloch v. Ribar*, 156

F.3d 673, 678 (6th Cir. 1998). Moreover, even if the Court were to construe these actions as § 1983 violations, the claims are barred as all action occurred more than one-year before this action was filed on August 18, 2004. KRS 413.140; *Ford v. Hill*, 874 F. Supp. 149, 151 (E.D. Ky. 1995). Accordingly, Ibarra's only timely claim of retaliation under § 1983 relates to his termination from employment.

To prevail on a First Amendment retaliation claim, a public employee must establish:

> (1) that [he] was engaged in a constitutionally protected activity; (2) that the defendant's adverse action caused [him] to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the adverse action was motivated at least in part as a response to the exercise of [his] constitutional rights.

Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036, 1048 *(quoting Leary v. Daeschner*, 228 F.3d 729, 737 (6th Cir. 2000)). If the plaintiff establishes the above three elements, the burden of persuasion shifts to the defendants, who must show, by a preponderance of the evidence, that they "'would have taken the same action even in the absence of the protected conduct.'" *Id. (quoting Leafy*, 228 F.3d at 737).

Seemingly, the temporal disconnect between Ibarra's statements and the alleged adverse action hinders Ibarra's ability to demonstrate that the defendants were retaliating against him. However, with the limited amount of information before the Court at this time, the Court is unable to say that, beyond doubt, "the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46. Accordingly, Ibarra's § 1983

claim for retaliation, relating to his termination from employment, withstands Defendants' motion to dismiss.

II. Intentional Infliction of Emotional Distress and Slander

A. Intentional Infliction of Emotional Distress

In his amended complaint, Ibarra alleges that an audit of the Cardinal Valley Empowerment Project, a police investigation into Ibarra's activities at the Cardinal Valley Center, and a telephone conversation between Mayor Isaac and Ibarra's wife amounted to outrageous and intolerable conduct which caused Ibarra severe emotional distress. In *Craft v. Rice*, 671 S.W.2d 247 (Ky. 1984), the Kentucky Supreme Court adopted the tort of intentional infliction of emotion distress based upon outrageous conduct contained in the Restatement (Second) of Torts, Section 46 (1965). In order to establish such a claim the Plaintiff must show

> (1) intentional or reckless conduct by the purported wrongdoer, (2) proof of conduct so outrageous and intolerable that it offends against the generally accepted standards of decency and morality, (3) a causal connection between the wrongdoer's conduct and the emotional distress, and (4) emotional distress that is severe. Additionally, the Plaintiff must demonstrate that the Defendants solely intended to cause the plaintiff emotional distress when engaging in the conduct. The evaluation of the criteria should be 'stringent,' and the action must be 'utterly intolerable in a civilized community,' a type of 'harassment intended to cause extreme emotional distress.'

Smith v. Franklin County, 227, F. Supp.2d 667, 683-84 (E.D. Ky. 2002) (internal citations omitted). Kentucky law is clear

that a claim of outrage or intentional infliction of emotional distress will not lie for "petty insults, unkind words and minor indignities; the action only lies for conduct which is truly outrageous and intolerable.'" *Banks v. Fritsch*, 39 S.W.3d 474, 481 (Ky. App. 2001).

While Ibarra was resentful and upset about the audit, investigation, and telephone call, the Court does not believe he has shown that Defendants' actions constituted outrageous conduct, nor that he has suffered severe emotional distress according to the criteria set forth in *Rice, supra*. The conduct alleged of Mayor Isaac simply does not stack up against the factual backdrop of other claims of outrage that have been the subject of judicial consideration and opinion in Kentucky.[1]

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[1] *Holmes v. Montgomery*, 2003 WL 1786518 (Ky. App. 2003) (strip search of minor children in public school did not rise to the level of conduct that shocks the conscience and thus the complaint failed to allege the existence of facts that would support damages for the intentional infliction of emotional distress); *Wilson v. Lowe's Home Center*, 75 S.W.3d 229 (Ky. App. 2001) (African-American employee's allegations that he was subjected to racial remarks on nearly a daily basis by his coworkers and supervisors for a period of approximately seven years were sufficient to establish claim for intentional infliction of emotional distress); *Humana of Kentucky v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990) (The Kentucky Supreme Court determined as a matter of law that a woman who gave birth to a stillborn baby could not maintain an action for outrage despite the fact that (1) it took 12-15 minutes for hospital personnel to respond to her cries for assistance, (2) a nurse told her to "shut up" because she was disturbing other patients; and (3) when she inquired what would become of her baby, a nurse told her that it would be "disposed of" at the hospital); *Whittington v. Whittington*, 766 S.W.2d 73 (Ky. App. 1989) (Alleged conduct of husband in committing adultery and, during pendency of divorce proceedings, endorsing checks with wife's name and spending the proceeds, and

Accordingly, Ibarra's amended complaint fails to state a claim for intentional infliction of emotional distress.

B. Slander

The Kentucky Court of Appeals has explained that a plaintiff must establish four elements in order to state a claim of defamation. Those four elements are "(1) defamatory language (2) about the plaintiff (3) which is published and (4) which causes injury to reputation." *Columbia Sussex Corp. v. Hay*, 627 S.W.2d 270, 273 (Ky. App. 1981), *review denied.* A statement is defamatory if it "tends to (1) bring a person into public hatred, contempt or ridicule; (2) cause him to be shunned or avoided; or, (3) injure him in his business or occupation." *McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882, 884 (Ky. 1981).

Ibarra alleges that Isaac slandered him in a single telephone conversation with Ibarra's wife. As told by Ibarra, Mayor Isaac advised Ibarra's wife via telephone that her husband had set up several bank accounts in her name; that her husband failed to provide requested financial records; and that her husband was in serious trouble. Even if Ibarra's

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other assets, in violation of prejudgment attachment of marital assets, and threatening wife that he would leave the country and she would receive nothing unless she agreed to settlement on his terms, did not reach the level of outrageousness required for the tort of outrageous conduct causing severe emotional distress); *Craft v. Rice*, 671 S.W.2d 247 (Ky. 1984) (In *Craft*, the Kentucky Supreme Court held that the alleged harassment - including keeping Craft under surveillance, threatening to put her husband in jail, and forcing her vehicle off the road - that took place over a period of months was enough to satisfy the threshold requirements for the tort of outrageous conduct).

allegations are true, the Court cannot conclude that such conduct rises to the level necessary to establish a claim for defamation. Reasonable minds would not differ in finding such statements insufficient to bring Ibarra into a position of public hatred, contempt, ridicule; cause him to be shunned or avoided, or injure him in business or occupation. Accordingly, Ibarra's amended complaint fails to state a claim for slander upon which relief may be granted.

III. Count III

Count III of Ibarra's amended complaint includes an all-inclusive constitutional claim wherein Ibarra alleges that the actions of the defendants previously set out in Counts I and II deprived him of his First Amendment rights of free speech and freedom of association and assembly. Specifically, Ibarra claims that Mayor Isaac's actions after Ibarra's termination from employment, were "retaliatory in nature and were intended to deprive, dissuade, inhibit, deter, discourage, prevent, and/or limit Ibarra's constitutional freedom of speech, association and/or assembly as a private citizen speaking out on matters of public interest and public concern." [Amended Complaint ¶45].

In his response to Defendants' motion to dismiss, Ibarra states that Count III is a freedom of association claim. Ibarra is correct in his assertion that the right of freedom of association has been recognized as a viable cause of action by both the United States Supreme Court and United States Court of Appeals for the Sixth Circuit. Plaintiff contends his amended complaint presents violations of (1) freedom of expressive association, and (2) freedom of intimate association. The Court, however, is unable to see how Ibarra's amended complaint sets forth a claim for either. Plaintiff's amended complaint makes no factual allegations as

to how Ibarra's freedom of association was hindered by acts of Mayor Isaac, Alayne White, or the LFUCG. Moreover, Plaintiff's amended complaint fails to state with whom he was prevented from associating.

Throughout Plaintiff's response to Defendants' motion to dismiss, Ibarra focuses on the "notice" pleading requirements of Fed. R. Cir. P. 8, and argues that his claims are not subject to any "heightened" pleading requirements. While this is in fact true, it does nothing to save his amended complaint from being dismissed for failure to state a claim upon which relief can be granted. The United States Court of Appeals for the Sixth Circuit has explained that a plaintiff may not hide a deficient complaint behind the guise of "notice" pleading:

> Although [the] standard for Rule 12(b)(6) dismissals is quite liberal, more than bare assertions of legal conclusions is ordinarily required to satisfy federal notice pleading requirements. In practice, a complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory.

Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436-37 (6th Cir. 1988) (internal citations omitted). In *Scheid*, the Court granted the Rule 12(b)(6) motion to dismiss stating that, "when a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist." *Scheid*, 859 F.2d at 437 (internal citations omitted). The same reasoning bears true for the case *sub judice*.

Accordingly, for the reasons stated above,

IT IS ORDERED,

(1) that Defendants' motion to dismiss [Record No.9] be, and the same hereby is, **GRANTED IN PART and DENIED IN PART;**

(2) that, with the exception of Ibarra's 42 U.S.C. § 1983 claim for retaliation based upon his termination from employment, all of Plaintiff's claims are **DISMISSED WITH PREJUDICE.**

This the 9th day of November, 2004.

Signed By:

Joseph M. Hood /s/JMH
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

Civil Action No. 04-395-JMH

[Filed August 25, 2004]

ABDON IBARRA,)
Plaintiff,)
)
v.)
)
LEXINGTON-FAYETTE URBAN)
COUNTY GOVERNMENT, *et al.*)
Defendants.)
)

AMENDED COMPLAINT

* * *

COUNT I

14. Ibarra was employed as the Coordinator of Immigrant Services for the Defendant, Lexington-Fayette Urban County Government (hereinafter LFUCG) from on or about December 20, 1999 until the date of his wrongful involuntary termination on or about August 27, 2003.

15. Ibarra's duties and responsibilities throughout his employment as Coordinator of Immigrant Services included, but not exclusively, the following: to act as liason for the LFUCG with the Hispanic community and to promote institutional changes and updates; to improve service delivery to the Hispanic community; to implement educational programs; to achieve cultural competence within the comprehensive service being provided to the community such as health, education, mental health, police services, and all other fields relevant to the improvement and support of the Hispanic community as a whole; to ensure that the Hispanic community made a smooth transition into the educational, social and economic infrastructure of the community as a whole; and to ensure that they affirmatively availed themselves of the rights and protections of the legal and justice system operating within the Commonwealth of Kentucky..

* * *

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

Civil Action No. 04-395-JMH

[Filed December 2, 2004]

ABDON IBARRA,	)
Plaintiff,	)
	)
v.	)
	)
LEXINGTON-FAYETTE URBAN	)
COUNTY GOVERNMENT, *et al.*	)
Defendants.	)
	)

ANSWER

ELECTRONICALLY FILED

* * *

14. Regarding the averments in paragraph 14 of the amended complaint, the defendants admit that Ibarra was an employee of the LFUCG from on or about December 20, 1999 until on or about August 27, 2003. The defendants deny that Ibarra was wrongfully terminated. The defendants are without knowledge or information sufficient to form a belief

as to the truth of all other averments in paragraph 14 of the amended complaint.

15. Regarding the averments in paragraph 15 of the amended complaint, the defendants affirmatively state that Ibarra's job duties and responsibilities were only those described in the job description for his position, and therefore deny all averments in paragraph 15 of the amended complaint inconsistent with that job description.

* * *

APPENDIX I

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein

shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX J

42 U.S.C. § 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.